

No. 21601 ✓

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

LEONARD MARVIN LUGO,

Petitioner-Appellant

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Respondent-Appellee.

APPELLANT'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GLENN D. RAMIREZ
RAMIREZ & HOOTS

514 Walnut Street
Klamath Falls, Oregon 97601
Attorneys for Appellant

ROBERT Y. THORNTON
Attorney General for Oregon

FILED

MAR 15 1967

DAVID H. BLUNT
Assistant Attorney General for Oregon
Supreme Court Building
Salem, Oregon
Attorneys for Appellee

WM. B. LUCK, CLERK

MAR 20 1967

SUBJECT INDEX

	PAGE
urisdiction of U. S. District Court	1
urisdiction of Court of Appeals	2
statement of the Case	2
uestions Before this Court on Appeal	4
1. Has Appellant been granted a hearing on the merits in this case?	
2. If so, has such hearing revealed exten- sion of constitutional rights to Appellant?	
Assignment of Error	5
Failure of Court to grant Appellant Writ of Habeas Corpus.	
Point and Authorities 1	5
Confession taken from intoxicated Appellant by coercion was involuntary.	
Point and Authorities 2	6
Such confession admitted against Appellant without hearing on question of voluntari- ness is denial of due process.	
Summary of Argument	6
Argument	7
Point 1	7
Point 2	20
Conclusion	43

TABLE OF CASES AND AUTHORITIES
CASES

	PA
Davis v. United States, 32 F2d 860, 863	6,
Escobedo v. Illinois, 378 US 478 (1964) ...	3, 4, 5, 6,
Holland v. Gladden, 226 Fed. Supp. 654, 655-656 ..	6, 1
Johnson v. New Jersey, 384 US 719 (1966)	
Lugo v. Gladden, 82 Or Adv Sh 737, 414 P2d 324	
Lynumn v. Illinois, 372 US 528, 83 S Ct 917, 9 L Ed2d (1963)	4
McCormick, Evidence 236, Section 113	44
State v. Bouse, 264 P2d 800, 811, 199 Or 696	6, 21, 22, 44
State v. Brewton, 344 P2d 744, 749	
State v. Brewton, 395 P2d 874, 880, 238 Or 590	6, 41
State v. Ely, 390 P2d 348, 349, 237 Or 329	6, 39
State v. Green, 128 Or 49, 61-62, 273 P 381 (1929)	39
State v. Hood, 69 Arizona 294, 213 P2d 368 at 271, 372 (1950)	42
State v. Linn, 173 P2d 305, 309, 179 Or 499	6, 22, 40
State v. Nagel, 202 P2d 640, 653, 185 Or 486	6, 40
State v. Nunn, 212 Or 546, 552, 321 P2d 356 (1958)	6, 40
State v. Rollo, 221 Or 428, 432, 351 P2d 422 (1960)	40
State v. Shipley, 232 Or 354, 362, 375 P2d 237 (1962) Cert. den. 374 US 811, 83 S Ct 1701, 10 L Ed2d 1034 (1963)	39
State v. Spanos, 66 Or 118, 134 P 6	41
Unsworth v. Gladden, U.S.D.C. (Ore) decided 12/27/66	5, 18

STATUTES

	PAGE
RS 136.540	41, 43
RS 138.530(1a)	2
United States Constitution, Amendment V	6, 18
United States Constitution, Article III, Section 2	2
8 USCA, Section 1291	2
8 USCA, Section 1343(3)	2

APPENDIX INDEX

Exhibits	44
Statutes ORS 138.530(1a) and ORS 136.540(1)	45
Opinion dismissing petition	46

No. 21601

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

LEONARD MARVIN LUGO,

Petitioner-Appellant

vs.

CLARENCE T. GLADDEN, Warden,

Oregon State Penitentiary,

Respondent-Appellee.

APPELLANT'S BRIEF

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON*

**STATEMENT OF JURISDICTION OF
UNITED STATES DISTRICT COURT**

This is an appeal by Leonard Marvin Lugo, an inmate of the Oregon State Penitentiary, from an Order of the United States District Court of Oregon denying him a writ of habeas corpus for alleged violation of his constitutional rights resulting in his imprisonment.

Lugo had exhausted his State remedies for post conviction relief under the Oregon Revised Statutes

138.530(1a). *Lugo v. Gladden*, 82 Or Adv Sh 737
414 P2d 324 (1966).

Jurisdiction to hear and determine this case is conferred on the United States District Court under the provisions of 28 USCA, Section 1343(3) which provides: "the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *"

The jurisdiction is further conferred in the United States Constitution under Article III Section 2 concerning jurisdiction to the Federal Courts and all cases arising under the United States Constitution.

JURISDICTION OF COURT OF APPEALS FOR NINTH CIRCUIT TO HEAR THE APPEAL

On November 25, 1966 the District Court entered its opinion and an Order dismissing Appellant's Petition.

Jurisdiction is conferred on this Court to review said Order under the provisions of 28 USCA, Section 1291.

APPELLANT'S STATEMENT OF THE CASE

This is a habeas corpus proceeding. The Appellant

is presently incarcerated in the Oregon State Penitentiary in Salem, Oregon. The Appellee is the warden of the Oregon State Penitentiary.

The basic factual issue is whether or not a confession was taken and used against Appellant without the safeguards protecting his right against self incrimination. The basic error of the District Court was in deciding the Federal decision of *Escobedo v. Illinois* took away the rights that Appellant had prior to June 22, 1964 with respects to the validity and handling of confessions prior to that date. The second claim of error is that Appellant was denied due process of law (1) by Trial Court in original conviction, (2) by State Court in post conviction proceedings under ORS 138-530(1a), and (3) in District Court in review of these proceedings.

This case was submitted to the United States District Court for decision upon motion to dismiss the petition filed by the Respondent and in connection with said motion District Court used the transcript of the proceedings of January 4, 1960, the transcript of the proceedings of June 28, 1965 and Appellant's Abstract of Record and Brief before the Supreme Court of the State of Oregon and Appellant's Reply Brief before the Supreme Court of the State of Oregon.

The District Court found that the case of *Escobedo v. Illinois*, 378 US 478 (1964) could not be applied to a trial completed in January of 1960 under the

authority of *Johnson v. New Jersey*, 384 US 719 (1966). Appellant is not quarreling with this finding. However the rules relating to confessions as they existed prior to June 22, 1964 were not taken away by this decision.

The Court then found that the Appellant was not intoxicated to the extent that his statement was inadmissible and that the trial court had given him the opportunity to challenge the voluntariness of the statement outside of the presence of the jury.

QUESTIONS BEFORE THE COURT ON APPEAL

As the Appellant was denied a trial or hearing in the District Court on the merits of his petition, it is necessary to comb the previous proceedings in order to consider the propriety of the Court's rulings. The first question that would be presented would have arisen at the trial of the original case of January 4, 1960. Were the safeguards against involuntary incrimination followed? Petitioner submits they were not.

A subsidiary question would be raised, if there is an issue of fact, was the Appellant denied a proper hearing in the District Court?

The next question would be whether or not by misapplication of the case of *Escobedo v. Illinois*, was the Appellant denied relief to which he was otherwise entitled?

The Appellant is here contending that a confession was taken from him while he was suffering from in-

toxication and the after affects thereof after he had requested and had been denied rest, and, when he made said statement in order to obtain rest, in addition to the denial of his right to counsel and his right to remain silent. In this regard he is conceding that the rights set forth in the *Escobedo* case, this is, that he be advised of his rights to counsel and his rights to remain silent would not be sufficient by themselves to afford him relief, but that the physical condition and coercion of the Appellant in addition to these facts rendered his confession involuntary under the pre-existing Oregon law, and such facts should have been determined by hearing out of the presence of the jury in accordance with Oregon law.

ASSIGNMENT OF ERROR

The District Court erred in dismissing Appellant's petition for writ of habeas corpus.

POINTS AND AUTHORITIES

Point 1

The Court erred in finding there was no intoxication or coercion making Appellant's confession involuntary.

Authorities

Unsworth v. Gladden, U.S.D.C. (Ore) decided
12/27/66

United States Constitution, Amendment V

Holland v. Gladden, 226 Fed Supp 654, 655-656

Davis v. United States, 32 F2d 860, 863

Point 2

The Court erred in the finding that because *Escobedo v. Illinois* did not apply at the time of the trial of this case that Appellant was not entitled to a hearing out of the presence of the jury on the question of voluntariness of confession and to have an involuntary confession excluded.

Authorities

State v. Bouse, 264 P2d 800, 811, 199 Or 696

State v. Brewton, 344 P2d 744, 749, 220 Or 266

State v. Brewton, 395 P2d 874, 880, 238 Or 590

State v. Ely, 390 P2d 348, 349, 237 Or 329

State v. Linn, 173 P2d 305, 309, 179 Or 499

State v. Nagel, 202 P2d 640, 653, 185 Or 486

State v. Nunn, 321 P2d 356, 361, 212 Or 546

SUMMARY OF ARGUMENT

The Trial Court found a dispute upon the evidence of intoxication of the Appellant at the time of the alleged confession thereupon ruled that the Appellant was not sufficiently intoxicated to render his statements inadmissible. (R 12-14) In doing this the Court failed to consider the Appellant's contention that by virtue

of his condition his confession was coerced thereby rendering it involuntary and inadmissible.

The Court further found that the Appellant was offered an opportunity of hearing outside of the presence of the jury on the question of voluntariness (R 15) whereas in fact the trial transcript reveals that the testimony relating to the confession was heard in the presence of the jury, over the objection of the Appellant, and the confession was admitted in evidence before Appellant was given the opportunity to rebut the admissibility of such confession—of what effect would be the Appellant's denial out of the presence of the jury?

Appellant is now contending that the District Court finding that *Escobedo v. Illinois* did not apply retroactively, dismissed Appellant's petition, overlooking the evidence and merits of Appellant's contention as it would have applied prior to *Escobedo v. Illinois*.

The difficulty of this appeal is that the contentions of the parties are found in a jumbled mass of testimony and exhibits as Appellant was not given a trial on the issues presented to the District Court and to this Court. The most orderly proceeding would be a reversal, grant the Appellant a hearing in the trial court, or if this Court is able to consider the testimony and exhibits, a reversal on the merits.

ARGUMENT

Point 1

The Appellant was intoxicated and while in such condition was coerced into giving an involuntary confession. Transcript of Proceedings, January 4, 1960 Tr. 1-4-60 P. 235.

- Q. Now, let's come down to the day in question, that was the 31st day of last August, August of 1959. Can you tell us whether you were here in Klamath Falls on the morning of that day?
- A. Yes.
- Q. Whereabouts in town were you?
- A. At what time? Just in the morning?
- Q. Well, when you first came downtown that morning?
- A. Well, I went to Vern's Tavern.
- Q. And by the way, where is Vern's Tavern?
- A. It is on Seventh and Main, I believe.
- Q. And how long were you there?
- A. Oh, about ten minutes.
- Q. Did you have anything to drink while you were at Vern's Tavern?
- A. One bottle of beer.

* * *

(Tr. 236)

- Q. The two of you went together to the Office?
- A. Yes, we did.
- Q. And about what time of day was it then?
- A. It was about 9:00 o'clock.

- Q. What did you do after you got to the Office?
- A. Well, we proceeded to drink.
- Q. You say you proceeded to drink?
- A. Yes.
- Q. Now, we are not interested in how much this friend of yours drank, but how long did you continue to drink there?
- A. Well, until I found my brother, I mean my brother found me.
- Q. Well, can't you give us about the time in hours?
- A. Well, the first time I had seen him was about 1:00 o'clock I believe in the afternoon.
- Q. In other words, Mr. Lugo, from the time that you went in there, and I think you said that was around 9:00 o'clock or thereabouts?
- A. That is right.

* * *

(Tr. 238)

- Q. Now, up to that time can you give the jury a fair estimate of how many drinks you had had?
- A. Well, I can't give a correct estimate. Oh, it was an awful lot.
- Q. And what had you been drinking?
- A. Well, I was drinking whiskey.

* * *

(Tr. 240)

- Q. Now, where did you go after you left your brother?
- A. I went directly to the Office.
- Q. Back to the bar?
- A. Yes.

Q. What did you do after you got there?

* * *

A. I ordered something to drink.

Q. What did you order in the way of drinks?

A. It was a shot of whiskey.

* * *

(Tr. 257)

Q. Mr. Lugo, after the incident that you just related what did you do?

A. Well, I continued to stay in the Office and drink. And I was—well, a certain instinct I guess of some kind, a person can tell when a man is serious about doing great bodily harm or killing him, I just sensed that.

* * *

(Tr. 265)

Q. And where did you go?

A. I went back to the Office.

Q. What did you do when you got back to the Office?

A. Well, I ordered some more drinks, some more whiskey to drink.

Q. Can you tell us about how many drinks you had on the occasion of that visit?

A. Well, no I couldn't say for sure.

Q. Well, could you give us an idea, Mr. Lugo?

A. No, I couldn't even say that.

Q. How long did you remain at the Office on that occasion?

A. Oh, I would say approximately fifteen minutes or half an hour, something like that.

* * *

(Tr. 268)

- Q. What did you do after you got in there?
A. Well, we went and sat down at the bar and had a drink.
Q. What did you drink there?
A. Well, I was drinking whiskey. I don't recall what he had to drink.
Q. Did you have just one drink or more?
A. I believe it was only one, I am not sure.
Q. Now, how long were you in the Office on that occasion, if you know?
A. I don't really know.
Q. About what time of day was it then?
A. Well, at that time I thought it was about 10:30 or 11:00 o'clock at night.

* * *

(Tr. 269-270)

- Q. What did you do when you got to Skeet's Tavern?
A. Well, we sat down.
Q. Pardon?
A. We went in and sat in a booth.
Q. Did you have something to drink in there, Leonard?
A. I ordered some beer, yes.
Q. When you say you ordered beer, you mean you were the only one that drank there?
A. No, I ordered beer for everyone.
Q. And do you know how long you were in Skeet's?
A. Well, it wasn't very long.
Q. Do you remember how many beers you had?

A. I believe I drank about half a bottle and that was all. I don't know for sure.

* * *

(Tr. 275-276)

Q. Now, you say that prior to one o'clock, Mr. Lugo, on the 31st of August, '59, that you had drank an awful lot; I believe that is the way you put it.

A. Yes, sir, that is right.

Q. And I assume that you were quite intoxicated by one o'clock were you not?

A. Well, I wasn't drunk at that time, but I could feel the alcohol, yes.

Q. Did you know what you were doing at all times at that time?

A. What do you mean?

Q. Well, did you know what you were doing? Did you know everything that was going on about you?

A. Yes, quite well.

Q. And by the time that Martinez beckoned you over after you had gone into Skeet's Tavern, I assume by that time you were quite drunk, were you not?

A. I was.

Q. And as a matter of fact you were so drunk that you did not know what you were doing? Is that what we are to understand?

* * *

(Tr. 277)

A. I was drunk, yes.

* * *

(Tr. 287)

"Did you make that statement to Mr. Goakey?

- A. Well, I wouldn't deny it. I don't remember it.
Q. Because you were drunk and in a state of shock?
A. Yes, sir.

* * *

(Tr. 306)

- A. I was drunk, yes.
Q. So drunk you don't know what you're doing?
A. I was drunk.

* * *

(Tr. 358-360, from the testimony of Mr. Loyal Johnson)

- Q. What time of day, or approximately what time of day did you first see him on August 31st?
A. It was approximately ten o'clock in the morning.
Q. And where did you see him, Mr. Johnson?
A. In the bar.
Q. Will you tell us what he was doing in there? What was his apparent purpose in being there?
A. He was just having a drink or so.
Q. Now then, Mr. Johnson, could you give us an idea of how long Mr. Lugo remained in your place after he first came in that morning?
A. He was in there off and on all day until a quarter after five when I went off shift.
Q. I'm speaking now about the morning. He was in and out, wasn't he?
A. Yes.
Q. A number of times. Perhaps you don't know, possibly you do, but if you do know about how long he remained in there—
A. If I remember correctly the first time he was in

there he was in there from ten in the morning until probably two in the afternoon.

- Q. And can you tell us what he was doing during that time?
- A. He was drinking.
- Q. Do you remember what kind of drinks he was drinking?
- A. I believe that he was drinking vodka collins.
- Q. Anything else to your recollection?
- A. Later in the afternoon he drank some whiskey.
- Q. Now, how many times, or approximately how many times would you say he left your place between the time that he first came in this morning and two o'clock in the afternoon?
- A. I don't think he left over once from the time he came in until 2:00 o'clock in the afternoon.
- Q. Do you know the occasion of his leaving that one time? Do you know why he did?
- A. No.
- Q. I think you say he next came in about 2:00 o'clock in the afternoon?
- A. No. The second time that he left was about 2:00 o'clock.
- Q. Oh, the second time that he left. Well now, how long, or approximately how long had he been in your place before he left the second time?
- A. He left for a few minutes around twelve o'clock, and came back in a little after twelve. And then he was there till approximately two o'clock.
- Q. Uh-huh. And what was he doing during this period of time between twelve and two when he was in the bar?
- A. He was just sitting at the bar drinking.

* * *

(Tr. 364)

- Q. I see. And he was gone for about how long?
- A. I would judge about an hour.
- Q. Then did he come back?
- A. Yes.
- Q. And about how long did he remain in your establishment that time?
- A. He stayed there about another hour.
- THE COURT: Who stayed there?
- THE WITNESS: Lugo stayed there.
- Q. And what was he doing during that period?
- A. He was drinking.
- Q. Do you know what he was drinking?
- A. He was drinking whiskey then.
- Q. Now, that would bring us down to about what time of day?
- A. About four o'clock then. He stayed until about four o'clock.
- Q. What hours do you work there?
- A. I was working 8:30 to 5:00. About twenty minutes after five I got off.

* * *

(Tr. 366)

- Q. I see. Let me ask you this, was the defendant drunk the last time you saw him?
- A. Not visibly, no.
- Q. Was he sober?
- A. Well, as far as a yes or no question to that, why, it would be pretty hard to answer in that case.

- Q. Well, give me a yes or no answer, will you?
- A. Well, no, he wasn't staggering drunk, no.
- Q. Was he sober?
- A. After having drank as many drinks as he drank—
- Q. Just answer the question yes or no, will you?

* * *

- A. No, he wasn't drunk.
- Q. Now, was he sober?
- A. I already said he wasn't drunk.

* * *

(Tr. 368)

- Q. Now, Counsel asked you if Mr. Lugo, the last time you saw him, was drunk or sober. First he asked if he was drunk, and you said not visibly. Now, what did you mean by that, Mr. Johnson?
- A. Well, Lugo drank in there considerably, and could drink an awful lot and never show he had been drinking is why I put it that way. And he never got out of line in all the times he was there, or I never heard of him getting out of line drinking. Consequently, it was a hard question to answer yes or no.
- Q. In other words, Mr. Johnson, I understand from your testimony that it might have been difficult to know—
- A. That is correct.
- Q. Whether or not Mr. Lugo was drunk or sober?
- A. That is right.

* * *

(Tr. 370)

MR. STEARNS: Oh, just one question, please, Mr. Johnson. I wonder, I am just wondering if you

could tell us approximately how many drinks of intoxicating liquor Mr. Lugo consumed in your place that day?

THE WITNESS: Well, that would be pretty hard to say.

MR. STEARNS: Well, just the best you can.

THE WITNESS: I imagine during the course of the day he probably had ten drinks.

MR. STEARNS: That would be whiskey and other intoxicating liquors?

THE WITNESS: Yes.

* * *

(From the Transcript of Proceedings June 28, 1966,
Page 10.)

Q. Now, when Mr. Goakey came in, can you just tell the Judge, to the best of your recollection, what, if any, conversation took place between yourself and Mr. Goakey at that time.

A. When he first came in the room, he asked the officer to remove the handcuffs that I still had on and he introduced himself, where he worked, and then he—I told him right then that—I asked him right then if I could get some rest, I told him that I was tired and I was kind of sick, and he offered me a cup of coffee after I told him that, and I accepted it and I told him that I was feeling pretty bad, that I'd like to get rest, I don't know how many times, and he said, "Well, don't you think you'd feel better if you talked about this," and I told him, "No," I said, "I'm tired, I'd like to go to bed, that is all I want, that is the only important thing to me now." So, I was answered with just what started to be an interrogation by him and—

Q. Prior to the time that any interrogation took place, other than what you have testified to here, Mr.

Lugo, did Mr. Goakey advise you that you had a right to remain absolutely silent?

A. No, he didn't.

Q. That was a constitutional right that only you could waive—

MR. LEWIS: Oh, I thought this was a statement, I withdraw my objection.

Q. (BY MR. VANDENBERG) Did he advise you of this?

A. No, he didn't.

Q. Did Mr. Goakey advise you that you had a right to have counsel's aid and assist you in the interrogation that was to take place?

A. No.

In this case had the District Court have considered the above testimony it would have found the testimony of intoxication far in excess of that in the case of *Unsworth v. Gladden* rendering the confession inadmissible by reason of intoxication and coercion. The Appellant contends that the above testimony shows coercion contrary to the Fifth Amendment of the United States Constitution "no person * * * shall be compelled in any criminal case to be a witness against himself * * *"

That an involuntary confession is inadmissible whether rendered involuntarily by reason of intoxication or coercion or both is without question. Circumstances which may render a confession involuntary are as diverse as the cases coming before the Courts.

In the case of *Davis v. United States*, 32 F2d 860, 863, the taking of an accused to a morgue, without promises or threats, was held such as to render a confession inadmissible being improperly coerced.

In this case we have a Defendant, a semi-illiterate Indian, under the influence of intoxicating liquor after having consumed intoxicating liquor for an entire day suffering from the affects thereof and after affects and from the shock of a trauma, forced to remain upright subjecting himself under these circumstances to the questioning of a skilled and trained adversary without any safeguards provided by law.

That such a confession would have been inadmissible prior to June 22, 1964 Appellant cites *Holland v. Gladden*, 226 F Supp 654, 655 (1963). In this case a Defendant was arrested on suspicion of many crimes whereas he admitted to the crime of burglary he was held and questioned with respects to the crime of rape and after repeated questioning gave a confession which was used against him in his conviction of the latter crime. "The actions of the police show a flagrant disregard of those procedural safeguards guaranteed all suspected criminals by the due process laws of the Fourteenth Amendment. The law enforcement officer did not warn petitioner of his Constitutional right to remain silent. In fact, they strongly implied—by words and actions—that petitioner was required to answer

questions put to him by the Sheriff and other police officers. * * *

ARGUMENT

Point 2

Not only was the confession taken under highly questionable circumstances as set forth in Point 1, but the safeguards bearing on the issue of voluntariness were not followed at the trial thereby denying Appellant the protection of this constitutional amendment. The District Court, in its opinion, stated "Lugo in his memorandum of authorities filed with this Court on July 25, 1966, asserts that his constitutional rights were deprived him because the trial court failed to hold a hearing outside the presence of the jury on the issue of voluntariness of his confession. There is no merit in this contention. The trial judge gave Lugo's lawyers an opportunity to present testimony about the statement's voluntariness in a hearing outside the presence of the jury. When the defense attorneys declined that opportunity, the judge admitted the statement."

This is not borne out in the Transcript of Testimony of the trial of January 4, 1960.

(Tr. 102)

Q. Now did anybody while you were present, did anybody threaten the defendant with physical violence to get him to sign that exhibit?

MR. STEARNS: Just a moment, I am going to object to that, your Honor, at this time. I would like

to call your honor's attention to a rule that is laid down in *State v. Bouse*, 199 Or.; and would at this time, your Honor request a brief recess in order that we might discuss this matter before proceeding.

THE COURT: The jury will retire to the jury room.

(Thereupon the jury retired to the jury room.)

MR. STEARNS: 199 Ore. at page 676, 700 and 701 your Honor. That was an opinion by the late Justice Tooze.

THE COURT: I remember it. Some years ago, wasn't it?

MR. BEDDOE: I believe it was. I think it was.

THE COURT: What is your point? I have this marked.

MR. STEARNS: If your Honor please, the point is simply the question of the admissibility of the alleged confession in the first instance is the matter for the determination of the Court, and that the better practice, as indicated in that decision, is to hold that inquiry out of the presence of the jury.

MR. BEDDOE: Of course, it hasn't been offered yet, your Honor. This is all a preliminary matter, and this just merely goes to the signing of the statement. It hasn't been offered.

THE COURT: I know it hasn't. I didn't say it had.

MR. BEDDOE: I think Counsel is getting a little hasty.

MR. STEARNS: I don't think so, your Honor, because it would be too late if we wait until the witness says yes, he signed it voluntarily and without compulsion.

MR. BEDDOE: That matter is also for the jury.

THE COURT: This *Bouse* case was determined

by the Supreme Court in 1953, December of 1953.

MR. STEARNS: That is right, your Honor.

THE COURT: And the new rule on admissions and confessions wasn't passed by the legislature until after that. That would make little difference here, as far as the qualifications, the preliminary work. But is it your point that no questions shall be asked about a confession or an admission in the presence of the jury?

MR. STEARNS: No, not necessarily, your Honor. But I understand that from the *Bouse* case, and from others as well, the case of *State v. Linn* which is cited in the *Bouse* case, that the better practice is recognized by the Supreme Court, is in the first instance that the Court hear and determine the admissibility, the question of the admissibility of the alleged confession out of the presence of the jury.

MR. BEDDOE: The fact is we aren't at the present time offering it.

MR. STEARNS: But you are.

MR. BEDDOE: I am just having it identified.

MR. STEARNS: No, you went beyond that, if you will go back—

MR. BEDDOE: Oh, yes, that is right. But the question of what was done at the time it was signed, I mean it is an inquiry that must go before the jury.

MR. STEARNS: The question, the specific question, your Honor, I objected to, was when Counsel asked in effect whether the signing of the alleged confession was voluntary.

MR. BEDDOE: All of it is what we are leading up to, yes.

MR. STEARNS: Yes. I think the Court probably—I am not saying the Court is bound to do it, but I say I believe that the better practice is for the Court to hear the facts surrounding the taking of the

alleged confession out of the presence of the jury in the first instance. That is my point.

MR. BEDDOE: It is going to have to go to the jury sometime.

THE COURT: Just how could that be done?

MR. STEARNS: It could be done right now, if your Honor please, out of the presence of the jury, and let the Court determine whether or not the Court finds that the alleged confession is admissible.

THE COURT: Is that your point right now?

MR. BEDDOE: I am merely showing that the signing of this particular exhibit was done without threats, coercion and so forth. That is my only purpose right at this time. Lt. Huff was not present when the confession was made. He was merely present when it was read by the defendant, signed by him, initialed and some corrections made.

MR. STEARNS: I think I have made my position clear.

THE COURT: Yes. The Court isn't going to bar you from the ordinary questions and answers. It is after the offer is made, after that offer is made that the question arises and probably should be taken care of in the absence of the jury.

MR. BEDDOE: That is the way we have always done it in the past.

MR. STEARNS: It isn't necessary to note an exception, but I have gotten in the habit of doing that.

THE COURT: You have your exception. Bring in the jury.

(Thereupon the jury resumed the jury box.)

MR. STEARNS: If your Honor please, before the question is answered may it be read back, because I am not sure I got the question.

THE COURT: All right, yes. Repeat the last question.

(Thereupon the question was read as follows: "Now, did anybody while you were present, did anybody threaten the defendant with physical violence to get him to sign that exhibit?")

MR. STEARNS: Well, if your Honor please, that raises the further objection that the witness was not present when the statement was taken, so he wouldn't be qualified to answer that question.

MR. BEDDOE: I asked him to get him to sign.

THE COURT: It is the signing. Read the question again.

(Thereupon the question was re-read by the reporter.)

THE COURT: Objection is overruled.

MR. BEDDOE: Go ahead and answer, Lieutenant.

After this initial reference to the Appellant's confession in the presence of the jury over objection by Appellant, further testimony was taken.

(Tr. 199-204)

BY MR. BEDDOE

- Q. Will you state your full name, please?
- A. Ortis W. Goakey.
- Q. Where do you reside, Mr. Goakey?
- A. I am now living on Clinton Avenue, No. 4607, Klamath Falls, Oregon.
- Q. What is your occupation?
- A. I am deputy district attorney for Klamath County, Oregon.

- Q. And were you so engaged on the 31st day of August, 1959?
- A. I was.
- Q. Now, calling your attention to the evening hours of that date, did you have occasion to receive a call with reference to a killing behind the Broiler restaurant in Klamath Falls?
- A. I did.
- Q. And what did you do with reference to that call?
- A. I went to the scene of the crime.
- Q. What time did you arrive at the scene of the crime?
- A. Approximately 7:30 p.m.
- Q. Who was present, Mr. Goakey, when you arrived there?
- A. Officer Dennis Lilly of the City police, I saw Officer Mattmiller of the city police, Bill Kendall of Ward's Funeral Home. I saw Detective Archie Huff of the city police. Subsequently I saw Officer Gerleve of the city police; I saw the defendant in this case, Mr. Lugo.
- Q. Do you see him present in court?
- A. Yes, I do.
- Q. Would you point him out, please?
- A. Yes. He is sitting next to Mr. Ramirez in the dark suit at the counsel table. And I saw his brother, Al Lugo, and these may have been some others, I can't recall at the moment.
- Q. When you arrived at the scene of the crime was there anyone present with the exception of the defendant and his brother who was not an officer and had some official capacity there?
- A. Not that I can recall.
- Q. Now, what, if anything, did you do after arriving

THE COURT: All right, yes. Repeat the last question.

(Thereupon the question was read as follows: "Now, did anybody while you were present, did anybody threaten the defendant with physical violence to get him to sign that exhibit?")

MR. STEARNS: Well, if your Honor please, that raises the further objection that the witness was not present when the statement was taken, so he wouldn't be qualified to answer that question.

MR. BEDDOE: I asked him to get him to sign.

THE COURT: It is the signing. Read the question again.

(Thereupon the question was re-read by the reporter.)

THE COURT: Objection is overruled.

MR. BEDDOE: Go ahead and answer, Lieutenant.

After this initial reference to the Appellant's confession in the presence of the jury over objection by Appellant, further testimony was taken.

(Tr. 199-204)

BY MR. BEDDOE

Q. Will you state your full name, please?

A. Ortis W. Goakey.

Q. Where do you reside, Mr. Goakey?

A. I am now living on Clinton Avenue, No. 4607, Klamath Falls, Oregon.

Q. What is your occupation?

A. I am deputy district attorney for Klamath County, Oregon.

- Q. And were you so engaged on the 31st day of August, 1959?
- A. I was.
- Q. Now, calling your attention to the evening hours of that date, did you have occasion to receive a call with reference to a killing behind the Broiler restaurant in Klamath Falls?
- A. I did.
- Q. And what did you do with reference to that call?
- A. I went to the scene of the crime.
- Q. What time did you arrive at the scene of the crime?
- A. Approximately 7:30 p.m.
- Q. Who was present, Mr. Goakey, when you arrived there?
- A. Officer Dennis Lilly of the City police, I saw Officer Mattmiller of the city police, Bill Kendall of Ward's Funeral Home. I saw Detective Archie Huff of the city police. Subsequently I saw Officer Gerleve of the city police; I saw the defendant in this case, Mr. Lugo.
- Q. Do you see him present in court?
- A. Yes, I do.
- Q. Would you point him out, please?
- A. Yes. He is sitting next to Mr. Ramirez in the dark suit at the counsel table. And I saw his brother, Al Lugo, and these may have been some others, I can't recall at the moment.
- Q. When you arrived at the scene of the crime was there anyone present with the exception of the defendant and his brother who was not an officer and had some official capacity there?
- A. Not that I can recall.
- Q. Now, what, if anything, did you do after arriving

at the scene of the killing?

- A. Well, I asked one of the officers, and I don't recall which one it was for sure, what had happened briefly, and I examined the scene of the killing.

MR. RAMIREZ: Now, if the Court please, I object to the conclusion of the witness.

MR. BEDDOE: Don't use the word "crime", Mr. Goakey, use the word "killing".

THE WITNESS: Well, I examined the scene there.

- Q. What did you do after you had examined the scene?
- A. I went to the Klamath Falls City Police Department.
- Q. And what time did you arrive there, approximately?
- A. Oh, approximately ten minutes to eight.
- Q. Did you see the defendant there?
- A. Yes, I did.
- Q. And where was that?
- A. He was in one of the detective's rooms.
- Q. Was he handcuffed at the time you first saw him?
- A. I believe that he was when I first saw him.
- Q. What, if anything, did you do with reference to those handcuffs?
- A. I asked the officer to remove the handcuffs.
- Q. Did you have occasion to talk to the defendant at this time?
- A. Yes, I did.
- Q. And who was present when you talked to him?
- A. Just the defendant and myself.

- Q. Did you discuss this shooting with him?
- A. Yes, I did. I asked him what happened.
- Q. Did he tell you?
- A. Yes, he did.
- Q. Was this subsequently reduced to writing?
- A. Yes, it was.
- Q. And by whom?
- A. By our stenographer Ruth Krider.
- Q. When did she come in?
- A. After the defendant had related to me what had happened, I then called her in in order to have him tell it to me again so it could be reduced to writing.
- Q. When he made this statement who was present when Mrs. Krider reduced the thing to writing?
- A. Just the defendant, Mrs. Krider and myself.
- Q. Was the defendant threatened with physical force to make this statement?
- A. No, he was not.
- Q. Was the defendant offered any reward for making this statement?
- A. No, he was not.
- Q. Was the defendant threatened orally to get him to make this statement?
- A. No, he was not threatened orally.
- Q. Was the defendant offered any immunity from prosecution in order to get him to make this statement?
- A. No, he was not.
- Q. Mr. Goakey, I will hand you what has been marked State's Exhibit T for identification and ask you

to examine it carefully, please.

(Witness complies.)

Q. What is that?

A. This is a written statement that the defendant gave us at that time and place.

Q. And was that statement transcribed from short-hand notes?

A. Yes it was.

Q. And from whose shorthand notes?

A. Those of Ruth Krider.

Q. Do you see any signatures appearing thereon?

A. Yes, I do.

Q. And whose signatures appear?

A. The signature of the defendant, Leonard Marvin Lugo, and those of Lt. A. W. Huff, and Ruth Krider.

Q. Were you present when those signatures were placed there upon that exhibit?

A. Yes, I was.

Q. Was the defendant given a full opportunity, and did he read that statement prior to signing it?

A. Yes, he did.

Q. Now, I notice there are also certain corrections or deletions made in that exhibit. Who made those?

A. The defendant.

Q. Were they initialed by the defendant after making them?

A. Yes, they were.

Q. Did you see the defendant do so?

A. Yes, I did.

Q. And I notice that at the end of each page there are initials. Whose initials are those?

- A. Those are the initials of the defendant.
- Q. Who put those there?
- A. The defendant, Mr. Lugo.
- Q. And did you see him do so?
- A. Yes, I did.

MR. BEDDOE: At this time, your Honor, I would offer State's Exhibit T for Identification into evidence.

MR. STEARNS: If your Honor, please, I think the offer is premature. I understand the rule to be that an offer of that character will be withheld until all of the testimony concerning the taking of the statement is before the Court.

THE COURT: Let me see the statement.

MR. BEDDOE: Yes.

(Handing same to the Court.)

THE COURT: The Court will withhold—

MR. BEDDOE: All right, fine.

and followed by testimony resulting in admission of the exhibit.

(Tr. 214-223)

BY MR. BEDDOE:

- Q. Will you state your full name, please?
- A. Ruth Krider.
- Q. And where do you reside, Mrs. Krider?
- A. 1507 Carlson Drive, Klamath Falls, Oregon.
- Q. You are employed, are you not?
- A. Yes, I am.
- Q. And where do you work?

- A. I work in the office of the Klamath County District Attorney.
- Q. And how long have you worked in the District Attorney's office?
- A. Since May, 1957.
- Q. What is your job in the district attorney's office?
- A. I am the legal stenographer.
- Q. Now, are you acquainted with the defendant in this case, Leonard Marvin Lugo?
- A. Yes, I am.
- Q. If you see him in court would you point him out, please?
- A. Yes, he is the gentleman in the dark suit to Mr. Ramirez's right at the counsel table.
- Q. Now, calling your attention to the 31st day of August, 1959, did you have occasion to see Mr. Lugo during the evening hours of that date?
- A. I did.
- Q. Where was that?
- A. That was at the Klamath Falls City Police Station.
- Q. Do you know what room?
- A. It was a private room that the city detectives use.
- Q. I see. And who was present at the time you saw Mr. Lugo there?
- A. Mr. Goakey, the deputy district attorney, and Lt. Archie Huff of the city police and myself.
- Q. How long did Mr. Huff remain there?
- A. Mr. Huff was there during the entire,—while the statement was being taken.
- Q. Are you sure about that?
- A. To the best of my knowledge. He may have left

the room, but to the best of my knowledge he was there. I had my back to him, and naturally I can't be real certain.

- Q. I see. Now, what did you do with reference to the statement given by Mr. Lugo?
- A. I took it down in shorthand and transcribed it immediately on a typewriter over there.
- Q. What did you do with it after you transcribed it?
- A. Then I took it back into the room where Mr. Lugo was sitting, and Mr. Goakey and Lt. Huff, and stayed there while the defendant read the statement, initialed the pages, and signed it.
- Q. I will hand you what has been marked State's Exhibit T for Identification and ask you if you recognize it?
- A. Yes.
- Q. What is that?
- A. This is the transcript of the statement taken from Mr. Lugo.
- Q. And are there any signatures appearing thereon?
- A. Yes, on the last page Mr. Lugo signed, and Lt. Huff and I signed as witnesses.
- Q. Were you present when the defendant signed that?
- A. Yes.
- Q. Were you present when he read it?
- A. Oh, yes.
- Q. I notice there are certain initials at the bottom of each page. Were you present when those were put there?
- A. Yes, I was.
- Q. Who put those there?
- A. The defendant, Mr. Lugo.

- Q. I notice there are certain corrections running through the statement. Were you present when those were made?
- A. Yes.
- Q. And who made those?
- A. Mr. Lugo when he read those.
- Q. At the time this statement was taken in shorthand by yourself did anybody threaten the defendant with physical force to get him to make this statement?
- A. No.
- Q. Did anybody threaten the defendant orally to get him to make this statement?
- A. No.
- Q. Did anybody offer the defendant any immunity from prosecution to get him to make this statement?
- A. No.
- Q. Did anybody offer the defendant any reward to get him to make this statement?
- A. No.
- Q. Was the defendant advised of his rights prior to the making of this statement?
- A. Yes, he was.
- MR. STEARNS: If your Honor please, of course I don't know what Counsel means by that. What was said?
- Q. Do you remember if Mr. Goakey said anything to the defendant prior to the time you started taking the statement down?
- A. Yes.
- Q. With reference to his rights?

- A. Yes.
- Q. Would you relate to the jury what you remember Mr. Goakey said to the defendant with reference to his rights prior to taking the statement?
- A. Mr. Goakey advised him he did not have to make the statement if he did not want to; and he also advised him that if a statement was taken it could be used against him if there was any further prosecution.

MR. BEDDOE: At this time, your Honor, I would reoffer State's Exhibit T for Identification into evidence.

THE COURT: Objection?

MR. STEARNS: We will object at this time, your Honor. I think all of the evidence should be in. I think that is the—

MR. BEDDOE: Mr. Stearns has a rather short memory. Archie Huff has already identified it.

MR. STEARNS: Oh, well, the defendant has not been on the stand.

THE COURT: Well, now, there is only one thing, and that is the notes from which that transcript was made.

MR. BEDDOE: Of course by Oregon law the defendant adopts whatever statement he reads and signs as his, so the notes really would not be important unless the Court would rather have both read into record.

THE COURT: I thought there was another objection to this.

MR. STEARNS: There was, your Honor, which we have discussed privately in chambers.

THE COURT: Well, I know. But unless that is brought out I have no record of it, you see.

MR. STEARNS: We certainly object, your

Honor, to the introduction of this statement in its present condition. There are certain corrections and deletion.

THE COURT: All right, what are they?

MR. STEARNS: Well, I can tell your Honor on what pages they appear.

THE COURT: Just have Counsel come up here. You can have the defendant come too, as far as that goes.

(Thereupon Counsel and the defendant approach the Bench.)

THE COURT: State the deletions you are referring to.

MR. STEARNS: Yes. This doesn't matter (indicating).

THE COURT: All of the deletions made by the defendant you want obliterated so they cannot be read?

MR. BEDDOE: Yes, I would agree to that.

THE COURT: Well, I can take care of that, someone can take care of that.

MR. BEDDOE: I would stipulate that the Court do it.

THE COURT: Is that stipulated?

MR. STEARNS: Yes, I would be glad to stipulate the Court do that or have it done.

THE COURT: Is that the objection?

MR. RAMIREZ: If the Court please, there would be a further objection to that, in that the witnesses who testified relative to this statement testified they all saw the defendant between an hour or an hour and a half. One witness, Mr. Huff, testified that it was after 9:00 o'clock, he remembers definitely it was after 9:00 o'clock, but he doesn't recall the time.

The rest of the witnesses have testified it was an hour after the alleged incident.

MR. BEDDOE: What Counsel is forgetting, your Honor—

MR. RAMIREZ: Let me finish. No one has testified as to what happened to the defendant relative to between the scene and the hour at which the statement was taken, being from an hour to an hour and a half later. Now of course the statute, of course, requires that it was not made under the influence of fear produced by threats. If the Court would look at one portion of that statement there it shows at least an implied threat. Does the Court have the statement there? I think the statement itself shows an implied threat. That would be on page six right there (indicating).

MR. BEDDOE: Yes, I would invite the Court to read that too. Remember, Alfred Lugo was not the defendant.

(Court reads statement.)

THE COURT: Is that the only point?

MR. RAMIREZ: Well, there is the one hour or hour and a half that is missing that is not accounted for—

MR. BEDDOE: May I comment on that?

MR. RAMIREZ: —during which the State has not accounted for. Yet they have it in their power to account for it as to whether or not threats were made to the defendant during that time.

MR. BEDDOE: May I comment on that?

THE COURT: Yes, go ahead.

MR. BEDDOE: The statement was made, your Honor, I think at eight something, and it had to be transcribed. And then it was signed apparently sometime around nine after it had been transcribed. And the Court can see it is a fairly lengthy statement.

THE COURT: This was a statement made to the brother. Any further objections?

MR. STEARNS: Well, if your Honor please, I think I have already made the objection that I think the offer is premature. I think both sides should be heard from before the Court rules on the offer.

THE COURT: Of the confession?

MR. STEARNS: On its admissibility, yes.

THE COURT: Although that would be done in the State's case in chief?

MR. STEARNS: Pardon?

THE COURT: A confession is admissible in the State's case in chief.

MR. STEARNS: Well, if that is the ruling.

THE COURT: I have never ruled different than that.

MR. STEARNS: If that is the ruling of the Court we simply would have to rest upon our exception, your Honor.

THE COURT: Yes, you may have an exception. The Court is going to obliterate the portions of this statement in accordance with the understanding we had in chambers, and it is only that portion that was stricken by the defendant. Now, you all had better be here. I think someone from each side should be here while I do this.

MR. BEDDOE: I would certainly trust the Court to do it.

THE COURT: I don't want to do anything that shouldn't be done.

(Thereupon the Court marked on the exhibit.)

THE COURT: I will instruct the jury right now to refrain from reading anything under the markings I have made here, not to read anything or try

to read anything that is under there. I am striking it out for that reason so you won't read it. You gentlemen can look it over.

(Thereupon respective Counsel examined the exhibit.)

MR. STEARNS: I think your Honor has already instructed the jury that the deleted matter is not at all a part of the statement.

THE COURT: Yes. I will show them if you want me to.

MR. STEARNS: Yes.

THE COURT: Members of the jury, there are spots through this statement—you see that black? See it there, there, there, there, there, there and there, (indicating). Don't try to read what is underneath that, will you? That is why I scratched it out.

MR. BEDDOE: Is it admitted now?

THE COURT: Yes.

MR. STEARNS: And would your Honor specifically instruct that the deleted matter is not at all part of the statement?

THE COURT: Yes, it is no part of the statement at all. That is why I have deleted it.

MR. BEDDOE: That is a matter that has been corrected by the defendant himself.

THE COURT: That was corrected by the defendant prior to his signing.

MR. BEDDOE: Yes.

MR. STEARNS: Yes.

(Thereupon State's Exhibit T for identification was RECEIVED in evidence.)

MR. BEDDOE: I have no further questions of this witness.

THE COURT: Cross examination.

MR. STEARNS: No cross examination.

MR. BEDDOE: At this time I would ask the Court's permission to read the statement of the defendant to the jury.

THE COURT: Yes.

MR. BEDDOE: May Mrs. Krider be excused?

MR. STEARNS: I think maybe she should, your Honor, although of course we have our running objection, you know.

THE COURT: Yes.

MR. STEARNS: I do object.

THE COURT: Yes. You may have an exception to every ruling I have made.

After admission of the confession out of the presence of the jury the Court withdrew the confession and offered the Appellant the following hearing.

(Tr. 225)

THE COURT: The Court is going to set aside its order admitting Exhibit T in evidence, and the Court is doing this so that there will be no question as to the defense of offering testimony if they so desire relative to the voluntariness of the statement.

MR. STEARNS: Thank you.

THE COURT: Do you have any testimony to offer relative to the admission of Exhibit T?

MR. STEARNS: Well, if your Honor please, now that puts us in something of an embarrassing situation. We hadn't anticipated this at the moment, and I don't believe we are prepared, are we?

THE COURT: Well, in the statement itself it states the defendant has not taken the stand. That is

in your statement. And the defendant, or any other witnesses you have now against the admission of this Exhibit T, this is the time here.

MR. STEARNS: What I had requested the Court to do was withhold admitting this until after the defendant had taken the stand.

After the testimony regarding the alleged admissions and confession by the Appellant which was held in the presence of the jury, to offer him an opportunity to rebut out of the presence of the jury is meaningless, not in accordance with due process of law or Oregon practice.

That the Oregon practice prior to June 22, 1964 required a court hearing out of the presence of the jury on the voluntariness of a confession prior to permitting testimony thereof in the presence of the jury is supported by many cases.

In *State v. Ely*, 390 P2d 348, 349-350, 237 Or 329 (Apr. 22, 1964), states the rule as follows: "A correct interpretation of our own cases, as well as those decided in the federal courts, would require the exclusion of an involuntary confession, whether made to law enforcement officers or to other persons. *State v. Green*, 128 Or 49, 61-62, 273 P 381 (1929). The fundamental question is whether the confession is the product of the free exercise of the confessor's will. *State v. Shipley*, 232 Or 354, 362, 375 P2d 237 (1962), cert. den. 374 US 811, 83 S Ct 1701, 10 L Ed2d 1034 (1963). See, for a more recent exposition of the rule on involun-

tary confessions, *Lynumn v. Illinois*, 372 US 528, 83 S Ct 917, 9 L Ed2d 922 (1963).

"(3) In this state, confessions and admissions are initially deemed to be involuntary. Before either can be received in evidence, the state has the burden of showing that it was voluntarily made, without the inducement of either fear or hope. ORS 136.540; *State v. Rollo*, 221 Or 428, 432, 351 P2d 422 (1960); *State v. Nunn*, 212 Or 546, 552, 321 P2d 356 (1958).

"The trial court, out of the presence of the jury, took the testimony bearing upon the Defendant's confession. After it heard the relevant testimony and the arguments of counsel, the trial court ruled that the state had made a *prima facie* showing of voluntariness. The confession accordingly was received in evidence."

In *State v. Linn*, 173 P2d 305, 309, 179 Or 499 (1946), the court restated the rule "the offer in evidence of a confession presents a preliminary question for decision of the trial court." In *State v. Nagel*, 202 P2d 640, 653, 185 Or 486 the court announced the similar rule requiring a preliminary hearing upon admissibility of a confession outside of the presence of the jury.

In *State v. Nunn*, 321 P2d 356, 361, 212 Or 546 (1958), the procedure for offer of proof of a confession was again described as being out of the presence of the jury and in the court's chambers.

In *State v. Bouse*, 264 P2d 800, 811, 199 Or 676 (1953), the court stated the rule "The admissibility of a confession is in the first instance a mixed question of law and fact for determination by the trial judge. On the offer of accused confession, the court must first determine as a preliminary matter whether it was voluntary and not made under the influence of hope or fear. Although we have held that it is not necessarily reversible error for this preliminary investigation to be held in the presence of the jury (*State v. Spanos*, 66 Or 118, 134 P 6) yet, for obvious reasons, the better practice is that it be conducted in the absence of the jury. The Defendant has the right to be heard upon this preliminary investigation without waiving any of his other rights on the trial. He may offer evidence to rebut that of the state which tends to show that the confession was voluntary. If the court determines from its preliminary investigation as a matter of fact and of law that the confession was voluntarily made within the meaning of Section 26-937, OCLA, (ORS 136.540), Supra, then it, together with all testimony affecting its voluntary character, is admissible in evidence. * * *"

In the case of *State v. Brewton*, 395 P2d 874, 880-881, 238 Or 590 (1964) court held as follows: "If the state elects a new trial and decides to offer a confession in evidence, it should so advise the court in camera. The court in the absence of the jury should then hear

all the evidence relevant to the voluntariness of the confession. The burden will rest on the state to prove to the satisfaction of the court that the confession was voluntary. If the court finds that the confession was voluntary, it shall note its finding in the record and admit the confession in evidence. Thereafter, as under our present practice, the state must again establish the voluntariness of the confession before the jury and the jury will be instructed that it has the duty to determine as a question of fact, first, whether the confession was voluntary, and second, if it was voluntary whether it was true, and that the issue of voluntariness shall be determined without regard to the truth or falsity of the confession. For an approved instruction conforming to the Massachusetts rule see *State v. Hood*, 69 Ariz 294, 213 P2d 368 at 371, 372 (1950).

"If the state elects to prove that the confessions received in the trial of this case were voluntary, the trial court shall hold a hearing and determine whether Brewton's confessions were voluntary. If the court finds that the confessions were voluntary, it shall make an appropriate finding and enter a new judgment of conviction based on said finding and the verdict heretofore returned by the jury. Since in this case a life sentence is mandatory, there is no question concerning credit for time served on the sentence hereby vacated. Such credit shall be appropriate if defendant was serv-

ing a definite term of years. * * * "Although in this opinion we have referred only to the admissability of confessions, our holding is applicable with equal force to all alleged admissions of the defendant. See, ORS 136.540; McCormick, Evidence 236, Section 113."

CONCLUSION

Though in court many times, Appellant has consistently met with evasion upon the questions herein presented. To afford him proper relief it is necessary that his conviction be set aside so that these questions can be properly resolved in the trial court.

Respectfully submitted,

RAMIREZ & HOOTS

by GLENN D. RAMIREZ

of Attorneys for Appellant

I certify that in connection with the preparation of this brief that I have examined Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney for Appellant

APPENDIX A

Exhibits

(As there was no formal hearing on petition, exhibits were not marked.)

Transcript of testimony January 4, 1960.

Transcript of testimony June 28, 1965.

Appellant's Abstract of Record and Brief, Supreme Court of the State of Oregon.

Appellant's Reply Brief, Supreme Court of the State of Oregon.

APPENDIX B

138.530 *When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.* (1) Post-conviction relief pursuant to ORS 138.510 to 138-680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

O.R.S. 138.530(1a)—A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

O.R.S. 136.540(1)—A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against him when it was made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction without some other proof that the crime has been committed.

APPENDIX C

SOLOMON, Judge:

Leonard Marvin Lugo, in his Petition for a Writ of Habeas Corpus in this Court, contends that his 1960 conviction of first degree murder is invalid because the trial judge improperly admitted in evidence his confession. Lugo contends that he made the confession while intoxicated and in a state of traumatic shock. He also contends that the confession was made without his being informed of his right to remain silent and his right to an attorney.

The parties have stipulated that I may decide this case on the pleadings, the exhibits, the transcripts of Lugo's trial and post conviction hearing and the briefs in the Supreme Court of Oregon.

The transcripts show that Lugo shot and killed Joseph Martinez in an alley in Klamath Falls, Oregon, between 7:00 and 7:10 P.M. on August 31, 1959. Police Officer Mattmiller arrived within two minutes of the shooting. He found Lugo, Lugo's brother and George Hill. Hill later became the State's principal witness.

While he was being searched, Lugo told Mattmiller that he had shot Martinez, and told Mattmiller where he had thrown his gun.

About 20 minutes later, the officers took Lugo to the District Attorney's office and gave him coffee. Within an hour, Lugo completed a lengthy statement, which the stenographer then transcribed. Lugo cor-

rected the typewritten copy and signed it shortly after 9:00 P.M. It is admitted that Lugo was not informed of his right to remain silent and have an attorney until the statement was about to be dictated.

The parties do not agree on Lugo's condition at the time of his interrogation in the District Attorney's office. Lugo testified that he was intoxicated and in shock. On the other hand, several other witnesses testified that in their opinion Lugo was not intoxicated either at the time of the shooting or at the time of his interrogation. Deputy District Attorney Goakey testified that Lugo told him he had "had something to drink, but * * * wasn't drunk." Goakey also testified that "(Lugo) was definitely sober."

From a judgment of conviction and sentence, Lugo filed a notice of appeal to the Supreme Court of Oregon. However, after discussing the matter with his new attorneys and on their recommendation, he abandoned the appeal. Later, he filed a petition for post conviction relief under ORS 138.530. In his petition, he alleged that his written statement was inadmissible because he had not been timely informed of his right to remain silent and have a lawyer. *Escobedo v. Illinois*, 378 U. S. 478 (1964).

The trial court denied Lugo's petition, and Lugo appealed. The Oregon Supreme Court affirmed the denial. It held that since the final order in Lugo's case preceded the June 22, 1964, decision in *Escobedo*,

supra, Lugo's confession was not rendered inadmissible because the interrogators failed to warn him of his rights before questioning him. Since Lugo did not contend that his statement was coerced, the Court held it was properly admitted.

I agree. *Escobedo* cannot be applied to a trial completed in January, 1960. *Johnson v. New Jersey*, 384 U. S. 719 (1966).

There is no merit in Lugo's present contention that he was too intoxicated to make a voluntary statement. Lugo's testimony that he was drunk at the time of the shooting was contradicted by the opinions of four other witnesses who observed him. Lugo consumed a substantial number of drinks prior to the shooting, but the record is clear that he was not intoxicated enough to render his statements inadmissible.

Lugo in his memorandum of authorities filed with this Court on July 25, 1966, asserts that his constitutional rights were deprived him because the trial court failed to hold hearing outside the presence of the jury on the issue of the voluntariness of his confession. There is no merit in this contention. The trial judge gave Lugo's lawyers an opportunity to present testimony about the statement's voluntariness in a hearing outside the presence of the jury. When the defense attorneys declined that opportunity, the judge admitted the statement.

This opinion shall constitute findings of fact and conclusions of law in accordance with Rule 52(a) Federal Rules of Civil Procedure. Lugo's petition is dismissed.

Dated this 25 day of November, 1966.

GUS J. SOLOMON
United States District Judge

